

\*\*E-Filed 12/04/07\*\*

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE REDBACK NETWORKS, INC.  
SECURITIES LITIGATION.

THIS DOCUMENT RELATES TO ALL  
ACTIONS.

Case Number C 03-5642 JF (HRL)

ORDER<sup>1</sup> GRANTING REDBACK  
DEFENDANTS' MOTION TO  
DISMISS WITHOUT LEAVE TO  
AMEND

[re: doc. no. 263]

In this securities fraud class action, Plaintiffs have sued a number of individual officers and directors of Redback Networks, Inc. (collectively, "Defendants").<sup>2</sup> The Defendants move to dismiss the operative fifth amended consolidated complaint ("5AC"). The Court has considered the briefing filed by the parties as well as the oral arguments presented at the hearing on November 16, 2007. For the reasons discussed below, the motion will be granted without leave to amend, and judgment will be entered for Defendants.

<sup>1</sup> This disposition is not designated for publication and may not be cited.

<sup>2</sup> The Redback Defendants are Kevin DeNuccio, Pierre Lamond, Thomas Cronan III, Vinod Khosla, Dennis Wolf, Vivek Ragavan, Dennis Barsema, Gaurav Garg, William Kurtz, Craig Gentner, Promod Haque and Randall Kruep.

## I. BACKGROUND

Plaintiffs are purchasers of stock in Redback Networks, Inc. (“Redback”), a telecommunications equipment provider based in San Jose, California. Several parallel class actions have been consolidated into the instant action, and the Court has appointed the Connecticut Retirement Fund (“CRF”) as lead plaintiff. Plaintiffs allege that Defendants engaged in a scheme to defraud the market that injured persons who purchased Redback stock during a four-year class period from November 27, 1999 through October 10, 2003.

The alleged scheme is described in great detail in this Court’s order of March 20, 2006 dismissing Plaintiffs’ third amended consolidated complaint (“March 2006 Order”), and need not be set forth with particularity again here. *See* March 2006 Order at 2-7. In brief, Plaintiffs allege that starting even before Redback’s initial public offering, Redback in essence bought revenues from Qwest Communications International, Inc. (“Qwest”) and others through bribery and *quid pro quo* arrangements. While Plaintiffs characterize the revenues resulting from the alleged bribery and *quid pro quo* arrangements as “improper” and “illegitimate,” it is undisputed that the revenues were real in the sense that Redback actually sold products to Qwest and others and actually received the stated revenues in return. Plaintiffs’ theory is that Redback’s recognition of these revenues created a false impression that Redback was doing well financially, causing the price of Redback’s stock to rise. Plaintiffs allege that class members purchased Redback stock at resulting inflated prices – the stock traded at well over \$150 per share for most of the first year of the class period. 5AC ¶ 196. By October 10, 2003, the last day of the class period, Redback’s stock price was \$0.55 per share.<sup>3</sup> Ultimately, Redback filed a pre-package bankruptcy plan of reorganization. 5AC ¶ 128.

In the 5AC, Plaintiffs allege that the truth of Redback’s dealings with Qwest began to emerge on March 11, 2002, when Redback’s stock was trading at or about \$4 a share. 5AC ¶¶ 455-56. Plaintiffs claim that “the first partial disclosure of fraud at Redback, and the first time

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<sup>3</sup> Defendants ask the Court to take judicial notice of Redback’s stock price pursuant to Fed. R. Evid. 201. Mem. at 3, n.3. The Court grants the request. *See Ravens v. Iftikar*, 174 F.R.D. 651, 661 (N.D. Cal. 1997) (taking judicial notice of stock prices on NASDAQ).

investors had any inkling that Redback's sales, earnings and revenues were generated by bribes and *quid pro quo* deals with Qwest and others" was a press release by Qwest issued on March 11, 2002 announcing that Qwest was under SEC investigation. 5AC ¶10. This press release did not mention Redback. Plaintiffs also allege that a Denver Post article published in late 2003 "exposed Redback's fraudulent course of business and *quid pro quo* transactions with Qwest." 5AC ¶¶ 10, 318.

Throughout the stock slide, Redback continually attributed its decline in revenues to "a current downturn in economic activity," and concealed the fact that the real reason for the decline was the loss of improper revenues from Qwest and others. 5AC ¶ 460. The truth of Redback's fraud was not revealed until October 2003. 5AC ¶ 464. It appears from the 5AC that Redback's stock already was trading below \$1 per share in October 2003; Plaintiffs do not allege that the stock fell further "when more of Redback's connection to the fraud was revealed." *Id.*

Plaintiffs assert the following claims against the Defendants: (1) violation of § 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder; (2) violation of § 10(b) of the Exchange Act and Rule 10b-5(a) and (c) promulgated thereunder; (3) violation of § 10(b) of the Exchange Act and Rule 10b-5 by means of insider trading; (4) violation of § 20A of the Exchange Act by insider trading; (5) violation of § 18(a) of the Exchange Act; and (6) control person liability under § 20(a) of the Exchange Act.

## II. SECTION 10(b) CLAIMS

### 1. New Factual Allegations

Section 10(b) of the Exchange Act makes it unlawful for any person, by means of any instrumentality of interstate commerce, the mails, or any facility of any national securities exchange, to use or employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe" in connection with the purchase or sale of any security registered on a national securities exchange. 15 U.S.C. § 78j(b). Rule 10b-5, promulgated by the Securities and Exchange Commission ("SEC") under § 10(b), makes it unlawful to: (a) "employ any device, scheme or artifice to defraud"; (b) "make any untrue statement of a material fact or to omit to state a material fact necessary in order to

1 make the statements made, in light of the circumstances under which they were made, not  
 2 misleading”; or (c) “engage in any act, practice, or course of business which operates or would  
 3 operate as a fraud or deceit upon any person in connection with the purchase or sale of any  
 4 security.” 17 C.F.R. § 240.10b-5.

5 The United States Supreme Court has held that these provisions give rise to liability for  
 6 two types of conduct: (1) the making of a material misstatement or omission or (2) the  
 7 commission of a manipulative act. *Central Bank of Denver v. First Interstate Bank of Denver,*  
 8 *N.A.*, 511 U.S. 164, 177 (1994). Plaintiffs allege a “fraud on the market” claim based upon  
 9 Defendants’ alleged material misstatements and omissions (first claim); a claim that Defendants  
 10 committed manipulative acts for which they are independently liable even absent misstatements  
 11 and omissions (second claim)<sup>4</sup>; and a claim that Defendants committed manipulative acts by  
 12 insider trading (third claim)<sup>5</sup>.

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14 <sup>4</sup> In its March 2006 Order, the Court concluded that a § 10(b) “manipulative act” claim  
 15 cannot be asserted separately from a § 10(b) misstatements and omissions claim merely because  
 16 the alleged misstatements and omissions were made in the context of an organized “scheme” to  
 17 defraud. March 2006 Order at 8. In a subsequent Order dated March 30, 2007 (“March 2007  
 18 Order”), the Court requested, based on its ruling in the March 2006 Order, that Plaintiffs  
 19 eliminate this claim because it was duplicative to the first claim. March 2007 Order at 5.  
 20 However, in the 5AC, Plaintiffs continue to assert a manipulative act claim. Plaintiffs add a  
 21 statement to this claim in the 5AC that “Plaintiffs’ losses were proximately caused by defendants  
 22 . . . reporting such figures without disclosing how they were generated.” (added material  
 23 underlined). However, because the Court previously concluded that this claim is duplicative of  
 24 claim 1, the claim will be dismissed with prejudice.

25 <sup>5</sup> In 2005, the Court ruled that the allegations relating to the stock sales were insufficient  
 26 to support a strong inference of scienter. January 2005 Order at 11. In the March 2006 Order,  
 27 the Court noted that “the [third amended complaint] provides much more specificity than  
 28 Plaintiffs’ previous pleadings with respect to the alleged illicit transactions, and the Court is  
 satisfied that Plaintiffs have provided the basis for their belief that those transactions occurred.”  
 March 2006 Order at 10. In its March 2007 Order, the Court stated that “[w]ith respect to claim  
 3, alleging a § 10(b) claim based upon insider trading . . . insider trading may constitute a  
 manipulative act for purposes of § 10(b) liability. *See United States v. O’Hagan*, 521 U.S. 642,  
 652 (1997) (holding that an insider who trades on material, non-public information in breach of a  
 fiduciary duty to the corporation may be held liable under § 10(b) and Rule 10b-5). While the  
 cases addressing insider trading sometimes refer to a “deceptive device” rather than a  
 “manipulative act,” *see id.*, liability under this theory is not based upon the making of a material  
 misstatement or omission but upon the breach of the relationship of trust and confidence existing

1 In its March 2007 Order, the Court held as follows:

2 Given these defects in Plaintiffs' [third amended complaint], the Court will  
 3 dismiss the § 10(b) claims against the Redback Defendants once again. As the  
 4 Redback Defendants point out, Plaintiffs have been afforded numerous  
 5 opportunities to allege a viable § 10(b) claim and have failed to do so. However,  
 6 in light of the liberal standard for amendment in securities fraud cases, *see Foman*  
 7 *v. Davis*, 371 U.S. 178, 182 (1962), and the complexity of the issues presented by  
 8 Plaintiffs' theory of liability, the Court will grant Plaintiffs one final opportunity  
 9 to allege a viable § 10(b) claim. The Court emphasizes that further leave to  
 10 amend these allegations will not be granted. It would be helpful to the Court's  
 11 understanding of Plaintiffs' theory if they would clearly allege what portion of the  
 12 stock drop they believe was caused by the alleged fraud. It also would be helpful  
 13 if Plaintiffs would streamline their amended pleading by omitting their second  
 14 claim, which the Court has found duplicative of their first claim, and by  
 15 shortening the amended pleading in any other manner that may be appropriate.

16 March 2007 Order at 9.

17 Plaintiffs assert that the 5AC further explains why Redback's statements about its  
 18 revenue, even though the revenue was "real" in a sense that money changed hands, were  
 19 misleading. Plaintiffs assert that this is an "omission case" in which the alleged "failure to  
 20 disclose the bribes and *quid pro quo deals* . . . rendered the representations about the sales and  
 21 other transactions materially false or misleading." Opp. at 2, 6-7. Plaintiffs argue that "what is  
 22 relevant is the undisclosed reason why the sales occurred." *Id.*

23 However, Plaintiffs' arguments in the 5AC are not meaningfully different from their  
 24 previous theory, already rejected by the Court:

25 [A]lthough Plaintiffs characterize the sales in question as "improper" and  
 26 "illegitimate," it is clear on the face of the complaint that the sales in question,  
 27 and the resulting revenues, were real. However it obtained business from Qwest  
 28 and other companies, Redback sold real products for real money. Plaintiffs have  
 not cited, and the Court has not discovered, any cases holding that accurate  
 reporting of revenues can constitute the basis of a securities fraud claim . . .  
 .[A]bsent any decisions holding that the accurate reporting of revenues can give  
 rise to a § 10(b) claim, the Court is not persuaded that the Plaintiffs can state a  
 viable claim based upon the facts alleged.

March 2007 Order at 7-8.

Plaintiffs cite *In re AOL Time Warner, Inc. Sec. and ERISA Litig.*, 381 F.Supp.2d 192,  
 202 (S.D.N.Y. 2004) (restatement); *In re Homestore.com, Inc. Sec. Litig.*, 252 F.Supp.2d 1018,

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between a corporation's shareholders and persons who have obtained confidential information by  
 reason of their position within that corporation, *id.*" March 2007 Order at 5-6.

1 1020 (C.D. Cal. 2003) (restatement); *In re Northpoint Communications Group, Inc. Sec. Litig.*,  
 2 221 F.Supp.2d 1090, 1102 (N.D. Cal. 2002) (fraudulent revenue recognition adequately alleged)  
 3 in support of their argument that the 5AC states an actionable § 10(b) claim. However, the Court  
 4 previously has found these cases distinguishable. March 2007 Order at 7-8. Further, the Court  
 5 noted that “[i]n fact, at least one district court has held expressly that plaintiffs failed to state a  
 6 claim for securities fraud based upon corporate defendants’ accurate reporting of revenues while  
 7 failing to disclose that those revenues were ‘boosted’ by large one-time sales that would not  
 8 recur, such that the future would not be as bright as the past. *In re Verifone Sec. Litig.*, 784  
 9 F.Supp. 1471, 1485 (N.D. Cal. 1992).” March 2007 Order at 7-8. Plaintiffs argue that *Verifone*  
 10 did not involve undisclosed bribery, and that “[i]n contrast, investors could not suspect that  
 11 Redback’s weakening sales were the result of the cessation of improper activities because  
 12 Redback told shareholders that the slowdown was due to general economic trends. It was not  
 13 until March 11, 2002 that there was any partial disclosure putting investors on notice that  
 14 something improper may have been going on at Redback.” Opp. at 7. However, as this Court  
 15 stated in its March 2007 Order, the fact remains that the revenues were accurately reported, and  
 16 even though they allegedly were increased in a way that could be misleading to investors, there  
 17 was no actionable securities fraud that could be alleged. Plaintiffs have not provided any new  
 18 facts or authority that would persuade the Court to depart from its previous rulings.<sup>6</sup>

## 20 **2. Loss Causation**

21 In the March 2006 Order, the Court concluded as follows:

22 While Plaintiffs’ allegations might support a claim that class members were  
 23 injured by the drop from \$4 to \$1 per share, this does not appear to be the claim  
 24 that Plaintiffs are making here. Based upon the extremely lengthy four-year class  
 25 period, the chart depicting the stock price over that class period, and the  
 26 arguments presented by Plaintiffs, it appears that Plaintiffs are claiming injury  
 based upon the fact that class members purchased Redback stock at inflated prices  
 well over \$100 per share throughout the class period. The Court is at a loss to  
 understand how Plaintiffs’ injury for such purchases was *caused by* the alleged  
 fraud when the stock price already had fallen to \$4 per share before the Qwest

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27  
 28 <sup>6</sup> Indeed Plaintiffs state in their opposition brief that they have “clarified” their existing  
 allegations rather than allege new facts or authority. Opp. at 2, 6-7.



1 revenues dried up and before the truth about the Qwest transactions was made  
2 public. *See Dura Pharmaceuticals, Inc. v. Broudo*, --- U.S. ---, 125 S.Ct. 1627,  
3 1633 (2005) (holding that it is insufficient to allege that plaintiffs purchased stock  
4 at prices that were inflated as a result of defendants' fraud, and that plaintiffs must  
5 demonstrate loss causation, i.e., a causal connection between the material  
6 misrepresentation and the loss).

7 March 2006 Order at 10. Plaintiffs subsequently amended their complaint in response to the  
8 March 2006 Order.

9 In the March 2007 Order, the Court concluded that:

10 Plaintiffs have amended their complaint in an attempt to address the Court's  
11 concerns [in the March 2006 Order] and, it seems, in an attempt to expand  
12 recoverable damages beyond the drop from \$4 to \$1 referenced by the Court in its  
13 prior order. As noted above, Plaintiffs now allege that the "truth" began coming  
14 out in June 2001, at which time Redback's stock was trading at a little more than  
15 \$11 per share. FAC ¶¶ 234, 452. What is confusing about Plaintiff's allegations  
16 is that they simultaneously allege that Defendants *concealed* the true cause of  
17 Redback's revenue drop, i.e., the loss of Qwest revenues. FAC ¶ 452(d). It  
18 appears that Plaintiffs are both trying to capture more damages by alleging that the  
19 "truth" began coming out at an earlier date than previously alleged, and trying to  
20 avoid the statute of limitations bar that would apply if Plaintiffs' claims accrued in  
21 June 2001. A claim under Rule 10b-5 must be brought within two years after the  
22 discovery of facts constituting the violation. 28 U.S.C. § 1658(b). Plaintiffs  
23 cannot have it both ways. If the "truth" began coming out in 2001, Plaintiffs' §  
24 10(b) claims appear to be time-barred. If the "truth" did not come out until later,  
25 as originally alleged, Plaintiff cannot capture damages for the greater stock drop.

26 March 2007 Order at 5.

27 In the 5AC, Plaintiffs assert that they have amended their loss causation allegations to  
28 show that the partial disclosures (which gradually informed investors that Redback's business  
has been built on fraud) began on March 11, 2002 and continued through October 10, 2003.  
Plaintiffs argue in the 5AC that a March 11, 2002 press release regarding Qwest satisfies the  
defect with respect to the loss causation that existed in their previous complaints. Plaintiffs  
allege that the stock price drop caused by the fraud is the decline from \$4.30 on March 11, 2002  
to \$0.27 per share on October 10, 2003. The corrective disclosure began, Plaintiffs allege, on  
March 11, 2002 when investors were told of an SEC investigation of Qwest's revenue  
recognition practices, and thereby received their first hint that the poor economy "excuse"  
Redback had been offering for declining revenues was suspect. 5AC ¶ 456. Citing *Dura  
Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005), Plaintiffs argue that their "only obligation in

pleading loss causation is ‘to provide a defendant with *some indication* of the loss and the causal connection that the plaintiff has in mind.’” Opp. at 7 (emphasis added). Plaintiffs claim that their new loss causation allegations satisfy this pleading standard.

Defendants respond, correctly, that Plaintiffs must do more than give “some indication” of what a causal connection “might be,” and that Plaintiffs’ must show a *plausible* factual theory of the causal connection between the alleged misrepresentation and the claimed loss. Defendants point out that the March 11, 2002 Qwest press release did not even mention Redback and thus it would not be plausible to assume that the press release caused the drop in Redback’s stock. Reply at 4. Defendants show that the day the Qwest release was issued, Redback’s stock price actually closed higher, thus negating any inference that the disclosure caused investor losses by revealing fraud at Redback. Mem. at 9, n.7. Defendants further note that Redback’s stock did not drop at all until eleven days after the announcement. Mem. at 9. Defendants argue that the Court would have to infer that the decline in the stock price as of October 10, 2003 was in connected to the March 11, 2002 Qwest press release, and that such an inference would be unreasonable because the two dates were eighteen months apart. *See, e.g. In re Gilead Sciences Sec. Litig.*, No. 03-4999, 2006 WL 1320466, at \*7 (N.D. Cal. May 12, 2006); *In re Compuware Sec. Litig.*, 386 F. Supp. 2d 913, 919 (E.D.Mich. 2005). Defendants assert that “[r]equiring the Court to draw inferences from the effect of the Qwest release would be especially unreasonable in this case, considering the general decline in the telecommunications industry during the alleged Class Period<sup>7</sup>, as well as plaintiffs’ position that ‘the truth about Redback’s relationship with Qwest did not become known until late 2003.’” Reply. at 4.

Plaintiffs continue to argue inconsistent positions that Defendants both concealed the truth until October 2003 and that the truth emerged prior to the 2003 date. 5AC at ¶ 455 (“The entire truth about Redback’s relationship with Qwest did not become known until late 2003, but a series of disclosures from March 11, 2002 through October 10, 2003 caused investors to begin

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<sup>7</sup> The Court has previously taken judicial notice to this fact. 2005 Order at 3 n.2.



1 to doubt that the weakening economy ‘excuse’ Redback offered was the real reason for  
 2 Redback’s poor performance and caused investors to suspect that something was amiss at  
 3 Redback.”) Plaintiffs have not demonstrated how a Qwest press release that did not even name  
 4 Redback caused Redback investors to doubt Redback’s claims regarding its performance. *See*  
 5 *Powell v. Indacorp, Inc.*, No. 04-249, 2007 WL 1498881, \*4 (D. Idaho May 21, 2007).

6 Given these defects in Plaintiffs’ 5AC, the Court will dismiss the § 10(b) claims against  
 7 the Defendants. Pursuant to the discussion in the March 2007 Order, because Plaintiffs have  
 8 been afforded numerous opportunities to allege a viable § 10(b) claim and have failed to do so  
 9 despite explicit direction from the Court, the Court concludes that further leave to amend is not  
 10 warranted.<sup>8</sup>

### 11 **III. SECTION 20A CLAIM**

12 Plaintiffs’ fourth claim is asserted under § 20A of the Exchange Act, which imposes  
 13 liability on any person who violates the Act or the rules and regulations promulgated thereunder  
 14 by trading on securities while in possession of material, non-public information. 15 U.S.C. §  
 15 78t-1(a). A § 20A claim may be brought by any person who traded contemporaneously with the  
 16 person possessing material, non-public information. 15 U.S.C. § 78t-1(a). Claims under § 20A  
 17 are derivative, and require proof of a separate underlying violation (a “predicate violation”) of the  
 18 Exchange Act. *In re VeriFone Sec. Litig.*, 11 F.3d 865, 872 (9th Cir. 1993). Plaintiffs have  
 19 failed to allege a predicate violation of the Exchange Act, and thus their § 20A claim also is  
 20 subject to dismissal with prejudice.

### 22 **IV. SECTION 18 CLAIM**

23 Plaintiffs’ fifth claim is asserted under § 18 of the Exchange Act. The elements of a § 18  
 24 claim are: (1) a misrepresentation or omission (2) of a material fact (3) contained in an SEC  
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26  
 27 <sup>8</sup> Consistent with previous orders, in light of the Court’s disposition of the Redback  
 28 Defendants’ motion, the Court again need not reach additional issues raised by the motion  
 regarding the adequacy of Plaintiffs’ scienter allegations and the viability of the group pleading  
 doctrine.

1 filing (4) upon which the plaintiff relied in the purchase of a security. 15 U.S.C. § 78r(a).  
2 Scienter is not an element of a § 18 claim. *See Howard v. Everex Systems, Inc.*, 228 F.3d 1057,  
3 1062 (9th Cir. 2000) (discussing differences between claims under § 10(b) and § 18).  
4 Nonetheless, the heightened pleading standard applicable to alleging a material misrepresentation  
5 or omission must be met in § 18 cases. *Cyber Media Group, Inc. v. Island Mortgage Network,*  
6 *Inc.*, 183 F.Supp.2d 559, 577 (E.D.N.Y. 2002). Moreover, a plaintiff suing under § 18 must  
7 demonstrate *actual* reliance on the fraudulent statement, and may not rely upon the “fraud on the  
8 market” theory that is available under § 10(b). *Howard*, 228 F.3d at 1062.

9 The Court previously dismissed the § 18 claim with leave to amend because the § 18  
10 claim was based upon the same theory as Plaintiffs’ § 10(b) claim, with the exception that the  
11 alleged misrepresentations and omissions regarding Redback’s revenues are limited to those  
12 statements set forth in Redback’s SEC filings. March 2007 Order at 10. In the 5AC, Plaintiffs  
13 once again have failed to allege adequately actual reliance on an actionable misstatement.  
14 Accordingly, the § 18 claim also will be dismissed.

#### 15 V. SECTION 20(a) CLAIM

16 Finally, Plaintiffs allege that a number of the Redback Defendants are control persons  
17 under § 20(a) of the Exchange Act. That section imposes joint and several liability on any  
18 “person who, directly or indirectly, controls any person liable” for securities fraud, “unless the  
19 controlling person acted in good faith and did not directly or indirectly induce” the violations. 15  
20 U.S.C. § 78t(a). Because Plaintiffs have failed to allege a viable claim of securities fraud, there  
21 is no basis for asserting controlling person liability under § 20(a).  
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**IV. ORDER**

In light of the numerous opportunities Plaintiffs have been afforded to plead a viable claim and Plaintiffs' continued failure to plead such a claim, Defendants' motion to dismiss is GRANTED WITHOUT LEAVE TO AMEND. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: December 4, 2007

  
JEREMY FOGEL  
United States District Judge

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